LAWYER AND CLIENT

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RELATION, RIGHTS & DUTIES

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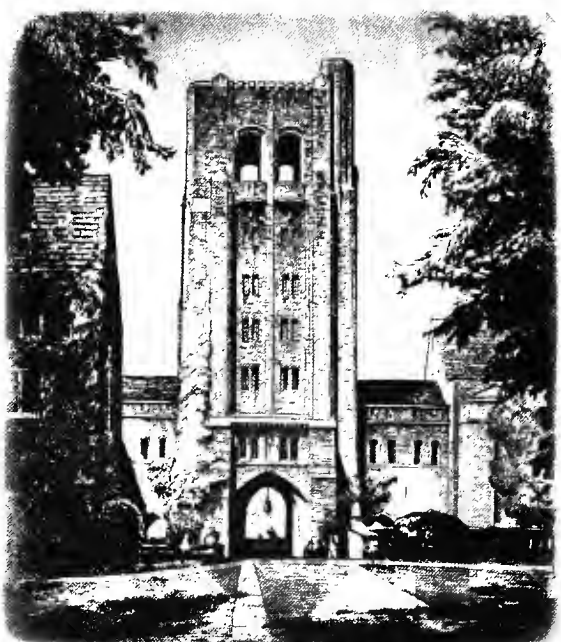

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LAWYER AND CLIENT:

THEIR

RELATION, RIGHTS, AND DUTIES.

BY

WILLIAM ALLEN BUTLER.

"All men, at all times and in all places, do stand in need of Justice, and of Law, which is the rule of Justice, and of the Interpreters and Ministers of the Law, which give life and motion unto Justice."—*Preface Dedicatory to* SIR JOHN DAVIES'S *Reports* (1615).

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INTRODUCTORY NOTE.

THE following pages comprise the substance of a lecture, delivered on the evening of February 3, 1871, before the Law School of the University of the City of New York, which, with some additions, is produced in its present form, in compliance with numerous requests for its publication.

In dealing with a subject which involves the discussion of a moral question, requiring a somewhat positive treatment, it is not easy to avoid a tone which may seem occasionally to border upon the dogmatic. But, in endeavoring to state with some precision the

true principles which apply to the professional conduct and responsibility of the Bar, it has been my aim to give expression to what I believe to be the assured convictions and settled views of the legal profession, according to its best exemplars, as well as of those moralists whose judgments are most entitled to respect. If, on the other hand, it shall seem to the professional reader that too much prominence has been given to what is obvious and rudimental, it is because I have hoped to interest the client, as well as the lawyer, in a discussion which relates to the rights and duties of each, and which concerns every one. Of the many attempted classifications of the human family, probably none will ever be more satisfactory to our profession than that which divides it into the two great generic classes of Lawyers and Clients. The number of lawyers, though generally conceded to be commensurate with the wants of

the community, is comparatively small, while, outside of the profession, every man, woman, and child, either as individual, stockholder, tax-payer, citizen, or inhabitant, at some time or other, directly or remotely, voluntarily or by compulsion, is placed in the position, and must share the benefits and risks, of a client.

LAWYER AND CLIENT.

EVERY man who subscribes the roll and takes the oath as an attorney and counsellor-at-law enters upon a profession which, in the common speech of mankind, is too apt to have a bad name, but which, by the common action of mankind, so often contradictory of their speech, has always held in trust the highest human interests. The literature of our mother tongue, reflecting the current opinions of each succeeding generation, is full of instances of coarse abuse or sharp satire directed against lawyers, by authors, wits, pamphleteers, and penny-a-liners. It is curious to note that the current of invective has often set strongest against the Bar, at the very moment when it was doing its best

and noblest work, in aid of social order or of the progress of the race. In the seventeenth century, just after Hampden and his noble band had fought in the Courts the battle of English liberty and constitutional law, the Press was issuing tracts with such titles as these: "*The Downfall of Unjust Lawyers.*" "*Doomsday drawing near, with Thunder and Lightning for Lawyers*" (1645, by John Rogers). "*A Rod for the Lawyers*" (1659, by William Cole). "*Essay, wherein is described the Smugglers', Lawyers', and Officers' Frauds*" (1675). Congreve, about the same time, makes one of his stage characters say that "a witch will sail in a sieve, but the devil would not venture aboard a lawyer's conscience." Ben Jonson's epitaph on Justice Randall condenses in a couplet the popular estimate of the profession:

> "God works wonders now and then,
> Here lyes a lawyer, an honest man."

Swift, somewhat later, in such pithy English as he alone could command, at the very time

when Chief-Justice Holt had just closed his noble career, and Lord Mansfield was beginning to win his great judicial fame, paints the profession as "a society of men, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black and black is white, according as they are paid."

Milton describes the lawyers of his day as "grounding their purposes, not on the prudent and heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions, and flowing fees," and his praise of Coke is offset by a censure of his brethren at the Bar.[1]

Later than these, John Wesley, the father and founder of Methodism—who, though

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[1] *Milton's Sonnet to Cyriac Skinner*, a grandson of Lord Coke, opens thus:

"Cyriac, whose grandsire on the royal bench,
Of British Themis with no mean applause,
Pronounced, and in his volumes taught our laws,
Which others at their Bar so often wrench."

something of a seer, had no prophetic vision of latter-day Book Concerns and sub-agencies —in a discourse on Original Sin, contemporary with the Commentaries of Blackstone, and delivered at a time to which we now look back as the golden age of the administration of justice in Westminster Hall, gives us this portraiture of the Bar, adapted bodily from Swift, though without crediting him with its authorship, a circumstance which certainly takes his invective out of the category of "original" sins:

"There is a society of men among us, bred up from their youth in the art of proving, according as they are paid, by words multiplied for the purpose, that white is black and black is white. For example, if my neighbor has a mind to my cow, he hires a lawyer to prove that he ought to have my cow from me. I must hire another to defend my right, it being against all rules of law that a man should speak for himself. In pleading, they do not dwell on the merits of the cause, but upon circumstances foreign thereto. For in-

stance, they do not take the shortest method to know what title my adversary has to my cow, but whether the cow be red or black, her horns long or short, or the like—after which they adjourn the cause from time to time, and in ten or twenty years they come to an issue. This society likewise has a peculiar cant or jargon of their own, in which all their laws are written, and these they take special care to multiply, whereby they have so confounded truth and falsehood, that it will take twelve years to decide whether the field left to me by my ancestors for six generations belongs to me or to one three hundred miles off."

Even Wordsworth, the contemporary of Talfourd and Romilly, whose pure verse usually reflects whatever is most exalted and liberal in the forms of thought, in his *Poet's Epitaph* casts this slur on the profession:

"A Lawyer art thou? Draw not nigh!
Go, carry to some fitter place,
The keenness of that practised eye,
The hardness of that sallow face."

It would be easy to multiply illustrations like these. Our own home literature has always reflected the same sharp contradiction between the prejudices which find vent on the lips of men in their irresponsible and excited talk, or in the rapid utterances of journalism, and the real trust reposed in the essential integrity, good faith, and fair dealing of the Bar.

The explanation of this seeming contradiction is not difficult. There are bad men in every calling, and more of them, probably, in the law than in the other learned professions, because of its ampler opportunities and readier means for misdoing; and, according to the custom of men, the worst specimens are those most generally accepted as types of the class, as if, by a perversion of a familiar rule, an implied warranty existed that the whole profession corresponded with the damaged sample.

But, besides this usage, which applies equally to every other profession, and enables those who will to visit on all physicians the

reproach of the malpractice of a few, and on all clergymen the scandals and follies of some, and on all Christian men and women the inconsistencies and faults of their fellows, there is another reason why our profession, which is the vehicle and engine of opposing interests, should, as it moves along its track, be covered with this perpetual dust of censure and detraction. The Law is the most positive of sciences, and the most vigorous of human forces. In its practical application to the affairs of men, it is perpetually compelling an unwilling submission to its demands. It makes men give up property which they want to keep, to pay debts which they prefer to owe or to avoid, and to perform obligations which they seek to break. It is perpetually dealing its blows and driving its bolts in the attack or support of some interest of person, or property, or public or social order. Those who practise it as a profession are necessarily placed in an attitude of perpetual antagonism to members or classes of the community, to individuals or bodies of men. It must,

therefore, needs be that offences come; and the profession as a class has often to assume the defensive against criticism and attack, and to reassert the principles by which its action is guided and governed.

The relation of lawyer and client embraces the most obvious and important duties of the counsel and advocate, and in fact involves the whole administration of the law, so far as it is intrusted to those who are engaged in its practice. A lawyer cannot act at all in his professional sphere in any other relation, and it is one which he seeks to establish between himself and every available member of the community. Certainly, if there is any vacuum which the nature of our profession abhors, it is that created by the want of a client. And, the moment the relation exists, there are certain definite and correlative rights and duties which spring from it and which inhere in its peculiar constitution; and which are, or should be, regulated by principles as definite as those which govern

the natural relation of parent and child, or the social relation of husband and wife.

The relation of lawyer and client is primarily one of trust. The lawyer is, in respect to the interest confided to him, more than an agent, he is a trustee. By the etymology of the term "client," tracing it back to its Greek root, we are reminded that, at the beginning, it was the honor and reverence paid by the suitor to the advocate for his care of his interests which gave rise to the name of client. The original definition of the word was "a client, or suitor; a nobleman's retainer or follower, the scope of whose attendance or duty is to be protected." Under the Roman law, in the days of the republic, the advocate was sought out and surrounded by his clients, and attended by them as by a princely retinue. His *retainers* were those of a feudal baron, and not those of a modern Barrister. He was the patron and protector of his clients, not for hire, but as the guardian and custodian of their rights; and, in return for his plea at the forum and

his taxed brain, they gave him their votes, their influence, and their muscle, and formed a kind of body-guard for his personal protection. The modern modes of practice fortunately relieve the lawyer from the constant personal attentions of his clients. Now and then, when an excise law is to be discussed, or a breach of the neutrality acts by ardent Fenians enquired into, or some distinguished champion of the roughs put in momentary peril before a petit jury, the advocate is, as of old, attended in court by a somewhat promiscuous delegation of his clients, but, happily for him, it is not the prevailing custom for them all to go home with him.

Yet the principle which found its ruder and more obvious expression in the Roman practice still underlies the relation of lawyer and client. The lawyer is always the trustee and custodian of the client's rights, and stands in his place in respect to all the interests which are properly confided to him.

The most common designation of a lawyer's compensation carries with it the idea of the

trust which it rewards. The word *fee*, so familiar to the ear of the lawyer—a familiarity, however, which never "breeds contempt"—is derived from the old French *fe* and the Latin *fides*, and is akin to the Saxon *feoff* or *fief*, denoting something which is given by one and held by another, upon an oath or promise of fidelity. So, in the retainer of the counsel, it is implied that, on accepting it, he is committed to the interest of the client by whom it is proffered, and is retained or held for his benefit.

The lawyer is, in every instance, thus pledged to fidelity to his client, and the oath which he takes, at the outset of his career, binds him, not only to the support of the organic law of the State, but also to the faithful discharge of the duties of his office of attorney and counsellor. But an honest man is always under oath; and the sanction of a formal vow adds nothing to the moral obligation springing of itself from the relation of lawyer and client, just as the oath of a witness in court imposes no new obligation to veracity, but only places

him in a position of definite responsibility for a falsehood. The lawyer owes his fealty to his client, not on account of his official obligations as an officer of the court, nor on account of the fee, paid or promised or anticipated, but because the man who, unable to act for himself, seeks him out and places himself in his hands, reposes in him a confidence which can only be met and satisfied by a corresponding fidelity. And this fidelity on the part of the lawyer to the trust reposed in him by the client comprehends his whole duty to the client. It implies fidelity at the outset in giving advice, as well as fidelity in managing the affairs or prosecuting or defending the cause of the client. Jeremy Taylor lays it down as a rule that "advocates must deal plainly with their clients, and tell them the true state of their case." This is a sound rule. Physicians may hesitate to tell their patients the truth, for fear of a fatal shock, but the truth told to a client never kills him, however much it may disagree with him. Many a client would be saved time, temper, peace of

mind, money, and reputation, were he advised at the beginning, what he so often discovers at the end, of a lawsuit, that he has no defence to a debt which he owes, or that he has no remedy for the wrong which he seeks to redress.

Analogous to this is the rule that the lawyer must not be the promoter of litigation, any more than the physician should be the promoter of disease. The law is for the redress of wrongs, it is never their cause. The stirring up of lawsuits has always been under the ban of a just public opinion, and the purchase by lawyers of causes of action is included in the censure. It is repugnant to the genius of the law and the sound moral sense of men, and has been repeatedly the subject of express statutory prohibition. The jurisprudence of civilized States condemns and forbids it. In this State, as long ago as 1807, the Legislature interposed to prevent attorneys from buying notes or claims for the purpose of bringing suit upon them, and declared it a misdemeanor. Public opinion pronounced it to be derogatory to the

character of a lawyer to be soliciting or purchasing business, and thereby causing distress in the community by unnecessary prosecutions, and the Legislature said that no man who resorted to such expedients should hold the office of attorney or counsellor in this State. The law was reënacted in 1813; and, not being rigorous enough to prevent abuses and evasions, a new and more stringent statute was passed in 1818, which prohibited all purchases of claims by attorneys, irrespective of the intent to prosecute them.

This statute gave great offence to some enterprising attorneys of that day. It was resisted in the courts, but it was sustained and enforced. It was argued, on behalf of the prosecution, that the Legislature had the same right to impose restrictions upon attorneys, in the practice of the law, that it had to regulate inns and taverns, those Westminster Halls of country justices and itinerant squires. It was optional with the attorney whether or not to practise under such restrictions. This view prevailed, and it was held that the statute

operated as an absolute prohibition against the purchase of notes and claims by attorneys or counsellors. Judge Cowen, in his report of the leading case on this subject, mentions, in a foot-note, that a Mr. Cook, of Saratoga, appeared in court at the term next after the passage of the Act of 1818, and moved to have his own name stricken from the rolls of the court as an attorney and counsellor. It was not that he loved the law less, but he loved the purchase of negotiable paper more. There being no opposition, the Court granted the motion, and his name was stricken from the roll.[1]

This voluntary martyrdom of the Saratoga attorney perhaps contributed to bring about a modification of the law, which was afterward, on the recommendation of the revisers of our statutes, so amended as to limit its application to cases where the purchase of the claims was made "with the intent and for the purpose

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[1] *The People* vs. *Walbridge*, 6 Cowen, 512. Note, p. 516. *Same case*, 3 Wendell, 120.

of bringing suit;" and, with this proper qualification, it now forms a part of our statute law.[1]

This statute recently received a somewhat singular application by a decision of the Court of Appeals, in a case where a prominent member of our own Bar, of honorable record in the public service, while acting in perfect good faith as counsel for a well-known corporation in the city of New York, and in its special interest, became the purchaser, at a receiver's sale, of sundry claims, an act which he supposed his clients would ratify. After the manner of corporations, it repudiated the purchase. He promptly assumed the ownership himself, and brought suit upon the claims. The statute was set up against him, and the Court held that he could not recover. As he shortly afterward died, full of years and honors, he was never prosecuted for a misdemeanor.[2]

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[1] 2 *Revised Statutes of N. Y.*, 288, § 71. *Reviser's Notes*, 3 R. S. (2d ed.), 697.

[2] *Mann* vs. *Fairchild*, 2 Keyes, 106.

It is not enough that the counsel do not promote litigation or speculate in causes of action. He must dissuade his client from commencing suit whenever it is clearly unnecessary. Lord Tenterden once rebuked an attorney thus: "You say in your evidence that you neither persuaded nor dissuaded the plaintiff when he applied to you on the subject of this action. In that respect you did not do your duty. It was your duty to tell him that he ought not to bring the action." [1]

This rule is of wide application, and extends to the conduct of a cause as well as to its inception. Sharp practice, sometimes so pleasing to clients and so tempting to attorneys, and always so odious to judges, doomed to endure the wrangles which it provokes, is no part of a lawyer's duty. The instructions of a client are no excuse for defences for delay or snap judgments, any more than for false or sham pleas.[2] The client has no right

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[1] *Jacks* vs. *Bell*, 3 Carrington and Payne, 316.

[2] *Johnson* vs. *Alston*, 1 Campbell, 176.

to control the attorney in the orderly conduct of the suit.[1] This is not only essential for the protection of the lawyer, but also of the client, whose satisfaction at seeing his adversary suffer on the sharp points of practice is sensibly diminished when his own turn comes to be impaled.

Equally plain and inflexible is the rule that the lawyer should never aid a client in doing an illegal act in such manner as to evade the law or to escape its consequences. Common-sense, easily and at once, discriminates between the legal advice or action which helps dishonest or crafty men to break the law with impunity and that which lawfully defends them after they are charged with its breach. The lawyer has no right to make himself an accessory before the fact to crime or injustice. He is himself an officer of the law, and to

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[1] *Anon.*, 1 Wendell, 108. In *Pierce* vs. *Blake*, 2 Salkeld, 515, Chief-Justice Holt says that "if an attorney puts in a false plea to delay justice, he breaks his oath, and may be fined for putting a deceit on the court."

assist in its violation is an act of treason paramount. But, subject to these qualifications, it is equally the duty of the lawyer to undertake the cause of his client, and to prosecute or defend it by all lawful means, whether the interest which it involves be great or small. And here we meet with graver questions touching the lawyer's relation to his client; questions which touch, at vital points, the general interests of society and the whole body of our profession, and which, like all questions of morals and social duty, assume new interest and importance whenever the public attention is specially concentrated upon them.

Stated simply, these questions are: *First.* May a lawyer act at all for a client whose character is bad, or in a cause whose justice he doubts? *Second.* What may he properly do in behalf of the client for whom and in the prosecution or defence of the cause in which he acts? To which we may add a *third* inquiry: To whom is the lawyer amenable for any supposed infringement of the moral

code in his acts done for his client and his cause?

The virtuous client is no doubt a crown to his counsel. If he is thrice armed who has his quarrel just, the advocate would be invulnerable, if the suitor whom he represented were perfect. But where is the scrupulous counsel, in satisfying the demands of the censor who requires him to act only for faultless plaintiffs and unblamable defendants, to look for these pattern clients? Perhaps the "babe unborn," so incessantly cited as the ultimate standard of innocence, and who, under the benignant provisions of the law regulating the descent and distribution of estates, is not unfrequently placed in the relation of a client, in cases involving the construction of wills and the disposition of the property of intestates, presents a pleasing instance of an absolutely blameless client; but even this innocent subject of equity jurisdiction may, in the course of a protracted litigation, develop into a prodigy of depravity. Fortunately, as the lawyer must take his clients as they come, he

is not the custodian of their consciences. As there is no statute, divine or human, which permits a defendant, either in the forum of conscience or the courts of law, to plead the bad character of his creditor in bar of an action for the recovery of his debt; and, as the worst criminal in the world is entitled to a fair trial, the footing on which a lawyer stands, while representing the legal rights of his client, is wholly separated from the standing of his client in his moral or social relations. In other words, while representing my client as to his claims and obligations under the law of the land, I have nothing to do with his obligations to any other law, nor am I in the least degree responsible for them. Let him be ever so delinquent or obnoxious, when viewed in the light of a strict moral scrutiny; let him be as radically vicious as the love of money, which is the root of all evil, can make him; let his conscience be seared and desiccated by a half-century of dealing in the most demoralized department of the dry-goods trade; though he may have hung around the most

disreputable corners and been dragged out of the dirtiest pools of Wall Street; though he may, in the very enforcement of his legal rights, break both tables of the moral law, by loving himself supremely, and hating his neighbor with a corresponding intensity; more than all, though his sole available grounds of defence may be usury and the statute of limitations, yet I am not to forget that I neither made him nor the statutes which he is entitled to plead. I have as clear a right, if I choose to exercise it, to try, by all proper and lawful means, to save his property from execution, as the physician of his choice has to save his body from disease or death, and it may be just as equally my duty to do it. More than this, if my client is a soulless corporation, having its being only by virtue of a charter—the result, it may be, of improvident or corrupt legislation—a body politic which cannot be shot at sight by the stockholder whose domestic peace it has ruined, or put into any Coventry of social infamy and disgrace, or drummed out of an indignant com-

munity—yet, as matter of strict professional right, and on grounds of solid public interest, I am as fully justified in representing it in the courts, as to its legal rights, in all fair and honorable ways, as if it were the most beneficent institution that philanthropy ever founded or benevolence ever administered. The highest human interests are involved in the assertion and exercise of this right of the lawyer to see to it, whenever called upon, that the judgments, favorable or unfavorable, just or unjust, right or wrong, of men or communities, as to the morality or immorality, good character or bad character, innocence or guilt, of his client, either generally or in respect to his attitude as a suitor, shall not, under any pretence, stand in the stead of the law and the evidence by which that client has a right to be judged.

It is true that many considerations may properly influence a lawyer in excluding from the range of his professional activities causes and clients of doubtful character or reputation, or involved in public odium or disgrace.

The defence of criminals is not a part of the general business of the lawyer in full practice in the civil courts, and is distasteful to most of our profession; and there may be parties so notoriously in league against the general interests of society as to make them common enemies, whom it would seem disloyal to defend or to represent. But this is not to obscure or to distort our view of the absolute right of the lawyer to represent and serve the client, however otherwise condemned, who is not yet condemned by the law; and, in the exercise of this right, no man or number of men may lawfully come between him and his client. This is the principle for which Erskine sacrificed his position as Attorney-General of the Prince of Wales, and his hope of higher preferment by the Crown, in his memorable defence of Thomas Paine, for the publication of his "Rights of Man." It is not to be supposed that his personal sympathies were any more on the side of his client than they were four years later, when he was counsel for the prosecution against the

publisher of the "Age of Reason" by the same pernicious author; but he was not to be turned aside from the plain path of professional duty, either by a mistaken popular clamor or by the solicitations of the heir-apparent to the throne. "If the advocate," he said, in his speech on this memorable trial, "refuses to defend, from what he may think of the charge or the defence, he assumes the character of a judge—nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation, puts the heavy weight of, perhaps, a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of the English law makes all favorable presumptions, and which commands the very judge to be his counsel." [1]

It is a source of unfeigned satisfaction to me that the last professional effort of my own father illustrated this plain principle. He gave the energies of an almost exhausted life,

[1] *Defence of Thomas Paine*, Erskine's Speeches, vol. 2, p. 270.

chiefly from a sense of duty, in favor of one who, from his religious faith as an Israelite and from other causes of personal prejudice, had become most obnoxious in the department of the public service to which he belonged, so that, after having been visited with nearly every form of punishment which it could inflict for offences, magnified by the rancor of an almost unanimous hostility, he was virtually dismissed from the service, under the provisions of a law set in motion against him by the same undeviating prejudice. His case was a desperate and an unpopular one. There was a wide divergence between the faith, the training, and the culture of client and counsel, but the result vindicated the righteousness of the cause; the barrier of caste was swept away by the strong hand of justice, and the prejudice hid itself from that impartial light in whose clear ray, when permitted to shine without obscurity by human passion, there is "neither circumcision nor uncircumcision, barbarian nor Scythian, bond nor free."

But, while the lawyer is not responsible for the character of his client, how far is he responsible for the character and conduct of his cause? Suppose the lawyer, upon the presentation of the facts by his own client, doubts the justice of the case, or that his individual opinion is against his client? Of course there are numberless instances where the counsel can and should, in such a contingency, prevent or stop litigation, and where this plain duty is discharged; but there are many cases, where men are compelled to defend suits brought against them, or to answer to charges of crime, or where litigation is made inevitable by circumstances, or where a counsel is retained to try or argue causes which he did not promote. Assuming that there are two sides to the case, may the lawyer honestly represent the side whose justice he doubts, and use his faculties in the prosecution or defence of a cause which he thinks that he would, were he the judge, decide against himself?

This is a question over which the casuists

have labored, and one in respect to which it is easy to create a confusion of ideas—because, in asserting the right of the lawyer to present the cause of his client, and to support it by every argument which can be adduced in its favor, however well assured he may be, as a matter of private conviction, that the law is against him, we claim an apparent exemption, as a class, from the operation of principles which, we all admit, should govern men in the ordinary affairs of life. Truth is, of course, the sole and unerring test and standard of right human speech and action. But the truth of facts, which are the subjects of positive knowledge, and as to which deception, concealment, or subterfuge, is always wrong, is one thing, and truth ascertained or established by the application of the rules of law to those facts is another thing; and, while the object of every legal proceeding is to ascertain and establish the truth, wherever there is room for argument and for opposing views, it is necessary and essential that both sides and every view should be presented. This the proper administration of

the law requires, and the interests of truth and justice require.

The saying of Democritus, quoted by Lord Bacon, that "truth lies in profound pits, and when it is found needs much refining," is most applicable to the processes of the law. The reports of adjudged cases, which are the great reservoirs of legal science, are perpetual witnesses to the general fidelity, integrity, and care with which the Bench, aided by the Bar, has always sifted truth from error, and, in the main, reached right conclusions at last. But such conclusions cannot be arrived at in any other method than that which the law provides.[1] A decision without argument, or on a hearing of only one side,

[1] "Justice," says Sydney Smith, "is found experimentally to be the best promoted by the opposite efforts of practised and ingenious men, presenting to the selection of an impartial judge the best arguments for the establishment and explanation of truth. It becomes, then, under such an arrangement, the decided duty of an advocate to use all the arguments in his power to defend the cause he has adopted, and to leave the effects of those arguments to the judgment of others."

does not weigh and cannot control. Men will never be bound by *ex-parte* decisions and judgments. The same instinct which is shocked by the judge who determines after hearing only one side, justifies the advocates who severally present and argue each side.

The least suspicion of partiality on the part of the judge is fatal to his good repute; but it is between opposing views, as well as opposing parties, that he must hold the scales with an equal hand. In George Whetstone's elegiac verses on the Lord Keeper, Nicholas Bacon (1579), he describes him thus:

> "His head was staied,[1] . . . .
> To hear complaints one eare was still awake,
> The other slept till the defendant spake."

This somewhat grotesque picture embodies the true idea of the impassive, imperturbable attitude of the judicial mind, whose office is equally to hear as to determine.

Dr. Johnson, in his rough way of moral-

[1] Probably the original Saxon equivalent for the popular Western encomium, "*His head is level.*"

izing, presents what may be called the butt-end of the argument in favor of the absolute exemption of the lawyer from any responsibility as to the right or wrong of his client's cause.

Boswell inquires whether, "as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty."

Johnson: "Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion; you are not to tell lies to a judge."

Boswell: "But what do you think of supporting a cause which you know to be bad?"

Johnson: "Sir, you do not know it to be bad until the judge determines it. I have said that you are to state facts fairly—so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince your-

self may convince the judge to whom you urge it; and if it does convince him—then, sir, you are wrong and he is right. It is his business to judge, and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

Boswell: "But, sir, does not affecting warmth when you have no warmth, and appearing to be of one opinion when you are really of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life?"

Johnson: "Why, no, sir; every one knows you are paid for affecting warmth for your client, and it is therefore no dissimulation. Sir, a man will no more carry the artifice of the Bar into the intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble when he should walk upon his feet."[1]

[1] *Boswell's Life of Johnson* (Crocker's ed.), vol. iii., p. 36. A further discussion of the question is in

The basis of this reasoning of Dr. Johnson, and of all kindred arguments in support of the lawyer's right to represent and advocate the client's cause, irrespective of its intrinsic merits, is manifestly the right of the client to be heard as to his cause. Bishop Warburton says of Cicero that he personated his client and spoke for him, and he adds: "Though some of those who call themselves casuists have held it unlawful for an advocate

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vol. iv., p. 16, as follows: "We talked of the practice of the law. Sir William Forbes said he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one. 'Sir,' said Dr. Johnson, 'a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice? It is that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed—but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence—what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are

to defend what he thinks an ill cause, yet I apprehend it to be the natural right of every member of society, whether accusing or accused, to speak freely and fully for himself. And if, either by a legal or natural incapacity, this cannot be done in person, to have a proxy provided or allowed by the state to do for him what he cannot or may not do for himself. I apprehend that all states have done it, and that every advocate is such a proxy."

The practical difficulty, however, is not so

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a class of the community who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage on one side or other, and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.' "

much in respect to the right of representing and arguing the client's cause, as in respect to the extent to which the counsel can go in his behalf. All lawyers are familiar with Lord Brougham's famous (perhaps, in a strictly moral view, infamous) assertion of the lawyer's privilege and duty, in the course of his defence of Queen Caroline. "An advocate," he says, "in the discharge of his duty, knows but one person in the world, his client, and no other. To save that client, by all expedient means, at all hazards and cost to others, and, among others, himself, is the highest and most unquestioned of his duties, and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon others—nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on, reckless of the consequences, even if his fate should unhappily be to involve his country in confusion for his client!" This was a high and somewhat rapid flight of oratory, far beyond any justifiable limit of duty or privilege.

The doctrine which it conveys is not the creed of the Bar here or in England, nor do I see how it can be accepted as the creed of any right-minded lawyer. It is rarely quoted, except to be condemned. Its last citation, with any apparent approbation, within my own recollection, was at a recent criminal trial, where the presiding judge read it to the jury in his charge, deeming it, as he is reported to have said, his duty to repeat to them the extreme rule governing the duty of a counsel, as laid down by Mr. Brougham, in his defence of Queen Caroline, adding: "As he afterward became Lord Chancellor, and lived, I believe, for ninety years, and as the extract appears in his published works, it may be presumed to remain at least of the same value it possessed when stated. I do not say whether I approve of it or disapprove of it; I state it as the extreme view, and one which any counsel for defence might adopt with conscientious belief in it." [1]

[1] *Trial of Daniel McFarland.* W. E. Hilton, New York, 1870. Charge of Recorder Hackett, p. 218.

The ground on which this bad example of a counsel, who became a Lord Chancellor, was thus given to the jury, in extenuation of the offence of its imitators, seems to have been not so much that Lord Brougham put forth his extravagant claim for the licence of the advocate, as that he never took it back, notwithstanding the extended *locus penitentiæ* which his fourscore years and ten afforded. In fact, he reiterated it, in substance, not long before his death, on a public occasion, signalized by the presence of several hundred of the leading barristers of England, assembled to do honor to the eminent French advocate, M. Berryer.[1]

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[1] Lord Brougham, in this after-dinner speech, likened Berryer to Erskine, saying that in both was observed the first great quality of an advocate, "*to reckon every thing subordinate to the interests of his clients.*" Lord Chief-Justice Cockburn, who followed Lord Brougham, said, in obvious reply, that "the arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas* and not *per nefas.*" For this citation I am indebted to the admirable address of Benjamin D. Silliman, Esq., before the graduating class of the Law School of Columbia College, 1867.

And yet, looking back at the earlier utterance, at the outset of a career marked by so much vigor of intellect, and such varied efforts for the welfare of mankind, I cannot but think that as the words we condemn were evoked by the heat of an unparalleled trial, his client a woman and a queen, with "millions of jealous eyes"[1] watching the conduct and issue of the cause, they flashed out in the enthusiasm and ardor of the moment, from an impulse such as that under which Burke, in his picture of that other ill-starred queen, says, "Ten thousand swords should have leaped from their scabbards to avenge even a look that threatened her with insult!"

In the experience of the profession it has only been in criminal cases that this heresy of Lord Brougham has ever been invoked on behalf of counsel or in aid of client. It was carried to its most alarming extent in the celebrated case of Courvoisier, the valet of Lord William Russell, tried at the Old Bailey in

[1] *Brougham's Speeches.* Adam and Charles Black, Edinburgh, 1838, vol. i., p. 103.

June, 1840, for the murder of his master. The prisoner was defended by Charles Phillips, one of the leading barristers of London, who conducted the cause of his client with great skill, and whose summing up to the jury was a most powerful and impressive appeal. He not only sought to destroy the effect of the evidence against his client, but to cast suspicion upon another member of the household, and succeeded so far as to cause the jury, against the clearest evidence, to hesitate for some time before they brought in the verdict of guilty, from which the evidence left no escape. It turned out that, before the summing up, the wretched murderer had made a full confession of his guilt to his counsel, who carried the secret in his breast, at the very moment that he was using every art and artifice to persuade the jury of the innocence of his client, and to poison their minds against another, and she an innocent woman. The fact became known, and the practical test to which the doctrine of Lord Brougham was thus subjected, like the touch of Ithuriel's spear, caused it to start up.

before the public view in a form peculiarly odious and hateful. Macaulay, in one of his most brilliant essays not long before, had asked the question, in reference to this very doctrine, "whether it was agreeable to reason and morality, whether it be right that a man should, with a wig on his head, and a band round his neck, do for a guinea, what, without those appendages, he would think it wicked and infamous to do for an empire? Whether it be right that, not merely believing, but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gestures, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false?" After the case of Courvoisier, public sentiment was disposed to answer that question in the negative, and to deny the right to exercise so dangerous a power even in the defence of an interest so sacred as human life.

Is there any real difficulty in reaching a just and safe conclusion on this vexed point?

The doctrine, as stated by the authorities I have cited, and put in practice in the case I have quoted, goes too far. But the danger is in the overstatement and the improper application, rather than in the rule itself. Within a certain and definite limit, it is true that the lawyer must, in the interest of his client, whenever any real case exists, sometimes forego his own opinion, and surrender his own judgment, and plead against his own convictions, and even succeed against his own expectations. This is because his client has a right to have his case determined by the Court, and not by his counsel, whose business it is to argue it. No one has made the lawyer a judge, or a divider, and the law is never determined as to any particular case until it has been tried in due course. So far, Dr. Johnson is right, and all the other moralists, from Paley down, who assert the duty and the privilege of the advocate to act on behalf of his client, whatever may be the issue of the cause, or his own belief in its justice; and who claim that he may, in the discharge of that

duty, and the exercise of that privilege, present the case, however doubtful, in its best and fairest light. But it is the *case* which he is to present, and nothing else. He may urge arguments and advance reasons, which go for what they are worth, the rule in respect to a lawyer's logic being always *caveat curia;* but he has no more right to lie or to cheat in the interest of his client in court, than he would have to lie or to cheat in his own interest out of court. The lawyer's rhetoric and his logic may be as wide and various as the four quarters of the globe, but they must "turn on the poles of truth." He has not the license of the actor, who is known to be playing a part, and therefore deceives no one in his assumed character; nor of the novelist, whose art is best employed in making fiction resemble truth. He is not a gladiator, who hacks and thrusts with venal weapons indifferently in any quarrel, still less is he an irresponsible part of "the machine of justice,"[1] without soul or

[1] "That the advocate is a part of the machine of justice," is the theory in substance proposed by Mr.

conscience, flying like a shuttle from one side to the other, through the intricate threads and meshes of law and fact, out of which are woven the warp and texture of the law. I cannot believe that anywhere, under any circumstances, has any client a right to expect his lawyer, while claiming to the utmost the benefit of his statutory rights and privileges, to break in his behalf any one of the Ten Commandments, or to violate a single obligation of a true Christian manhood.

In the application of this rule, every lawyer must be a law unto himself. It would be just as impossible to determine in advance its precise scope and applicability, as it would be to apply the moral law beforehand, so as to adapt it to the ever-varying circumstances of social and domestic life, and the ever-recurring questions of duty and of interest. I

Basil Montagu, in his little tract describing the character of a barrister, etc. See O'Brien's "Lawyer." London, Pickering, 1842—a quaint treatise "after the manner of George Herbert's Country Parson," where this and other pleas for a lawyer's irresponsibility are condemned, and an elevated morality enjoined.

know that there are tender and sensitive moral organizations, which shrink from the pursuit of a profession which subjects its members to the necessary and inevitable ordeal of such a discipline. One of the most eminent divines of this city, the predecessor in office of the rector of one of our leading churches of the Episcopal denomination, abandoned the profession of the law, in mature life, after attaining a fair position at the bar, upon the ground, as recorded in his published correspondence, that while in the conduct of his professional pursuits he had endeavored to maintain fidelity toward all, he had often advocated causes against which, as a judge, he would have pronounced; and had sometimes been obliged to make himself the organ of the passions and feelings of others, in a way that it would not be possible for him any longer to do, and preserve that consistency of character, and that peace of mind, at which it was his settled purpose to aim.[1] Doubtless there was

[1] *Stone's Life of Milner* (American Tract Society), p. 131.

here a high degree of conscientiousness, constituting, perhaps, in this individual instance, one of the elements of a divine call to another sphere of duty, but as a rule of general application it indicates a standard

> . . . . "too bright and good
> For human nature's daily food."

For other men, and in the exercise of the truest courage, I cannot but think that in the face of such a peril resistance is better than flight. If lawyers are to try only the cases in which there is no room for doubt, if infallibility is the test of legal integrity, if we must search with lighted candles for honest clients, if the advocate cannot pursue his calling without making himself the organ of bad passions and evil principles, then no man can safely pursue at the same time the practice of the law and the practice of virtue—we must all turn our backs on the profession, and remit society to the natural laws of self-protection and the police force of the State. But there is no such alternative. No heavier burden is laid upon the conscience of a lawyer than on that of

every other man in whatever lawful pursuit he may be engaged. The temptations may be greater, but the education is more thorough. The dividing line between right and wrong ought to be most clearly discerned by those who are trained to distinguish it. The lawyer's conscience as well as his intellect may find in his own calling the truest means of culture.[1]

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[1] Coleridge, surveying the profession from a philosophical stand-point, declares his conviction that "an advocate is placed in a position unfavorable to his moral being and to his intellect also in its higher powers;" he recommends that he devote "a part of his leisure time to some study of the metaphysics of the mind, or metaphysics of theology; something which shall call forth all his powers and centre his wishes in the investigation of truth alone, without reference to a side to be supported." "Some such studies," he says, "are wanted to counteract the operation of legal studies and practice, which sharpen indeed, but, like a grinding-stone, narrow while they sharpen—" ("Table Talk," vol. ii., p. 7). This view is less keen than narrow. It presupposes that legal studies are always with reference to a side to be supported, which is incorrect, and overlooks the fact that the only thorough and safe method of study for a lawyer is that which candidly investigates the truth of the case, and comprehends both sides in its preparation for the argument of one. After all, it is the native cast of the intellect which pre-

There may be and there are abuses and wrongs constant and grievous, which bring reproach upon the profession; and yet it remains true that all the foundations of society would be unsettled if men were not assured that they could rely, in all emergencies, upon a fair prosecution or defence of every right which a citizen may claim in a free country, which the courts are open to determine, and which a class of men is specially trained to discuss.

But we are not to rest the privilege of the advocate upon a mere defence of the principle which sanctions it. It is the glory of our profession, and the great solace as well as the frequent reward of its toils, that in every case in which the labor of the lawyer is rightly pursued and faithfully performed, a positive

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determines the scope of the mental powers in the study of any science. Burke justly says that the law is "a science which does more to quicken and invigorate the human understanding than all other kinds of human learning put together; but it is not apt, except in persons very happily born, to open and liberalize the mind exactly in the same proportion."

result is reached which, besides determining the rights of the immediate parties, adds, in its measure, something to the great body of jurisprudence and of the law. The discussions and debates of lawyers in the courts do not, like so many of the controversies which employ the tongues and pens of other disputants, end as they begin, in a conflict of opinions beyond the possibility of final arbitrament or decision. The verdict of the jury ends the trial, and the judgment follows. There may be review and reversal and rehearing, but at the end, and in the court of last resort, there is at once a limit to the argument and an absolute end of the strife. The uncertainties of medical science which point the proverbial inquiry—

"Who shall decide when doctors disagree?"

indicate no corresponding perplexity in the law, which embodies in itself the amplest powers of determining the difficulties which it provokes. The *odium theologicum* is

only another name for the inextinguishable flames of controversy on questions in respect to which there can be no binding rules of universal application. It is only in the realm of legal science that discussion and debate lead by prescribed and definite paths to certain and unchangeable decrees.

Let it, then, be clearly understood, in our behalf who are lawyers, that we are the ministers of justice and not its dispensers; that we are not responsible for our clients, nor, in any sense, properly their representatives, save as respects the legal rights confided to our care; that we are not responsible for bad laws which we did not make, enacted by legislators against whom we probably voted, nor for bad judges, the results of a system against which we may have struggled, but which we cannot change; that of our clients' rights we are the trustees and custodians, not as our property but theirs, for whose protection and enforcement we are to use our best endeavors in their behalf, and not in our own; that in the discharge of this trust we

have a right to do whatever our client would have a right to do himself, were he qualified to act in person; that whatever he could do without violating any natural, moral, or statute law, for himself, we may do for him; and that whenever his cause requires, or his solicitation tempts us, to do what is wrong or mean, what if he did himself we should condemn, he forfeits the relation of client, and we stand discharged of our trust.

It is certain that a just and enlightened sentiment on this subject will permit of no wider license for the Bar, nor does any honest cause require it. Aside from local (and, it is to be hoped, temporary) hinderances to the real progress of the profession, the general intelligence is so far in advance of what it was, the rules of law are so much better understood, the rights of men are settled on so much surer foundations, that there is really no more excuse for tolerating a system of legal warfare which involves subterfuge and deceit, and which makes the court-room an ambuscade, than there is for going back to the bar-

barous law Latin and law French of former times, over whose disuse Blackstone so eloquently grieved. We have dispensed with the wigs, bands, and gowns, and other paraphernalia of the English Bench and Bar; and as we are far in advance of many of their ancient prejudices and old forms, in the administration of justice, it would seem to be the province of our American jurisprudence, which grapples so easily and successfully with the innumerable new questions evolved by the peculiarities of our national and commercial life, to mark a corresponding advance in the candor and fair dealing, and honest love of truth, which should be the pervading atmosphere of every shrine of justice.

To whom is the lawyer amenable for any supposed infraction of the rule of right in his acts done for his client, and in his cause?

As an officer of the Court he is liable to its scrutiny of his acts, and to its censure for any ascertained malpractice. In a recent case, our Court of last resort, by a unanimous opinion, declared that the inferior Courts may and

ought to cause charges to be preferred against an attorney or counsel, whenever satisfied, from what occurred in the presence of the Court, or from any satisfactory proof, that a case exists where the ends of justice and the public good call for it.[1] In the case referred to, the charges on which the appellant had been stricken from the roll of the Supreme Court were, that his general reputation was bad, that he had been several times indicted for perjury, and that he was a common mover and maintainer of suits on slight and frivolous pretexts. The order by which he was disbarred was affirmed. It is a somewhat curious corroboration of the last specification that this indefatigable litigant is reported, in a recent newspaper, to have commenced an action against the proprietor of a Brooklyn journal, claiming heavy damages for the publication of a statement that he had been thrown over the Bar!

The lawyer is also liable to be arraigned at

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[1] *In re Percy*, 36 New York Reports, 651.

the bar of public opinion, as was the case with Counsellor Phillips, for his defence of Courvoisier, whenever his course for a client seems to conflict with good morals, so as to constitute an offence against society. But it should be borne in mind that public opinion can only properly and finally pronounce upon what is undisputed, or established beyond any reasonable doubt and accepted by common consent as notorious fact. It may assume, in respect to any particular case, rightly or wrongly, in advance of any legal investigation, or of any testimony which would be competent if tested by the plainest rules of evidence, that the client is corrupt, that the Court is corrupt, and that the counsel is corrupt, but it cannot proceed to judgment in a case involving the relation of lawyer and client to each other, to the judiciary, and to the public, so long as any element of doubt remains, certainly not so long as issue is taken upon the main question of fact, and the merits of the case are entangled in the meshes of newspaper controversy and discussion.

Public opinion is very much like the Court of Chancery under the ancient system. It has vast powers, but its conscience needs to be informed by findings of fact by a competent tribunal; while the press, acting in its proper sphere, resembles the old Master in Chancery, a functionary of prodigious importance, whose chambers were a drag-net of all sorts of evidence, relevant and irrelevant, admissible and inadmissible, who was obliged to record all the testimony of every witness, of every shade of credibility, who noted all the objections, and reported all the proceedings, but who was wholly incompetent to punish for a contempt, or to direct a decree, and who yet, when giving his opinion upon the facts, as he was sometimes permitted to do, was very apt to fancy himself the most important branch of the Court of Chancery. If the opinions and views of intelligent men, freely expressed and exchanged in the intercourse of society, on all current topics of interest, could be caught in the air and conveyed in all their freshness and force to the columns of the

daily journals, and sent abroad as authentic utterances of public opinion, doubtless they would acquire a momentum and weight far greater than that which attached to them in the private circles where they were spoken, but their intrinsic value would not be enhanced in the least. The voice of the press is louder than the voice of the private citizen, and that is all. The chief advantage of the press consists in this, that in going to the great jury of the public it has not only the first and the last word, but the perpetual word. But, after all, its function is purely ministerial and not judicial. Public opinion, which is properly served by the ministries of the press, filters its various and conflicting views in the alembic of its common-sense, and deals justly, in the end, with the reputation of the lawyer, as it does with that of the statesman or the soldier, remembering that, whatever service he has rendered to the cause of social progress, inures to the general benefit and advantage, and that the good name of every citizen ought to be reckoned a part of the

common property of all; but not forgetting, also, that no one is exempt from censure where it is deserved, and that, in the case of every established offence, the higher the position the worse the crime.

The Bar itself cannot disbar. It may combine its members by voluntary association, for the protection and promotion of the general interests of the profession, and in aid of a higher standard of practice. Scrutiny into the professional acts of its members would seem to be within the legitimate powers of such bodies. But they necessarily move in a limited sphere, and, without the power of compelling testimony, they could hardly assume the province of judge or jury, in the hearing or trial of issues involving personal character, except in cases of voluntary submission to their jurisdiction, or where definite charges are made by a responsible accuser, of their own number. A deliberate declaration of opinion by such a body, or its deliberate action upon the basis of conceded or established facts, would have just

weight in proportion to the unanimity with which it was expressed, and the good characters of those who participated in it. Hasty or ill-considered action would be apt, if favorable, to be impeached on the ground of partiality, and, if unfavorable, to be questioned on the score of prejudice. The judgment of immediate associates, to be of value, must be most dispassionate and unselfish. Many men have been indorsed by their fellows who have been condemned by the rest of the world; and some men have been cast out of synagogues without any serious injury to their permanent reputation.

If it be asked, "How, then, can wrongs be best exposed and punished?" I answer, by the strictest scrutiny, in the clearest light, by the press and the profession, of the conduct of every lawyer who acts for a client, and by the deliberate judgment of the public on what in the end is seen to be true. What is to be deprecated is the false issue and the prejudiced opinion, formed in the dark, or in the cross-lights of disputed facts

and personal controversies. The daylight and the truth are what are wanted, and all that is wanted in and by which to try every man's work.

But the lawyer is amenable, first of all and last of all and most of all, to his own conscience. An enlightened sense of individual responsibility is the surest and safest guide for every man. It is the only remedy I know of for all the evils of the time which weigh so heavily upon us. The metropolitan lawyer must adapt himself to the emergencies of a clientage which makes and loses fortunes between the rising of the sun and the going down thereof, which measures ability by immediate success, which grasps the most gigantic schemes, and reaches out after the most remote results. The lawyer is the man of affairs more than the jurisconsult; he comes to be identified in the public view with his clients' interests, and must bear the burden of their acts as well as of whatever is amiss in the administration of justice, of which he forms a part. The root of the evil is not

in the Bar, it is in Society. Human nature is the same now that it ever was, and what we need is not so much to reduce the number of bad judges or unscrupulous lawyers, or guilty clients, as to multiply the number of good men, and to increase in every man's estimation the worth of a high standard of individual character. It is of little avail to involve court, counsel, and clients, in the same breath of condemnation, or to make either bear the censure it conveys. True, it may be said that no corrupt judge ever did injustice except on the suggestion of some roguish lawyer, and no lawyer ever moved improperly except in the interest or on the prompting of some dishonest client. But this is simply the same reasoning in a circle which girdled the tree of knowledge in the garden of Eden. "The serpent tempted me and I did eat;" "the woman gave unto me and I did eat." The answer was the personal sentence against each individual offender. The lawyer of to-day, as it seems to me, is more than ever remitted to the original, un-

changeable laws of personal duty and accountability, and the best results of an awakened public interest in respect to questions of professional duty and obligation will probably be found in the new sense of those obligations in individual minds.

There are minor details of duty involved in the relation of lawyer and client at which we can only briefly glance. There is that of inviolable secrecy, of which, to the credit of our profession, we rarely hear a breach. There is that of undertaking the cause of the poor man, without the hope of reward, and of protecting the oppressed from harsh exactions; the duty of persevering in the defence of the client through good and evil report, and in spite of his own imperfection and unreason. There is also the duty of frankness in regard to every thing which happens affecting the client's interest in his lawyer's hands, and of prompt—I would say instant—reckoning for every dollar of money which belongs to him. The lawyer should not lose a moment in seeing that his client's money gets into

his client's pocket, and it should never be mixed with his own. There is no if or but about this rule, and it is a very plain one.

Not a little might be said as to the advantage to the lawyer of intercourse with an intelligent client. Independently of the genuine friendship which such a relation often produces, there is hardly a client from whom the lawyer may not gain much that will be of real value to him in the practice of his profession. One of the most eminent and brilliant English lawyers of the last generation, Mr. Charles Butler, says very truly that "the knowledge absolutely necessary for every person to possess who is to practise the law with credit to himself and advantage to his client, is of so very abstruse a nature and comprehends such a variety of different matters, that the utmost time which the compass of a life allows for its study is not more than sufficient for the acquisition of that branch of knowledge." The lawyer must always be a student, and it is a great gain to be able to add

to the stock of his knowledge those things which he may learn incidentally from men who are versed in other branches of practical knowledge and invention.

It is hardly necessary to add, in this branch of our subject, that a lawyer should never be his own client. This injunction has passed into a proverb which receives frequent illustrations of its truth. And it might not be an injury to our profession if we supplemented the saying that "a lawyer who pleads his own case has a fool for a client," by suggesting that the lawyer who testifies in his client's cause, except as to mere matters of form or routine, or to supply undisputed facts, is very apt to have a knave for his witness.

The relation of lawyer and client involves, on the part of the client, duties which are correlative to those enjoined upon the lawyer.

The confidence, frankness, and fidelity, which belong to the relation, must be mutual

and interchangeable. It is hardly assumed, as it was under the Roman law, that the client shall vote for his lawyer, or fight for him, for the form of compensation has changed; but the liberal spirit which the ancient usage embodied may easily find expression under our modern modes of intercourse and appreciation. The model client may be sketched in a few words; he anticipates the require- of an "affidavit of merits," by stating to his counsel, fully and fairly, not *his* case but *the* case; he not only seeks, but takes and follows, advice; he is willing to trust his lawyer not only in the management of his cause, but in the making out of his bill.

The cautious client may make the compensation of his counsel a matter of contract. And here again we find ourselves in advance of our British brethren of the Bar, in this, that while under the law of England a barrister is incapable of contracting for any reward for his services in a cause, either before, or during, or after the litigation, upon a fanciful notion that it is beneath the dignity

of the robe, we are fortunately discharged from any such limitation.[1]

The disability of the English barrister has lately been established in an interesting case.[2]

The suit was for the recovery of the modest sum of £20,000, which Mr. Kennedy, a Birmingham barrister, claimed for services as counsel of a Mrs. Swinfen, in a long chancery

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[1] In England attorneys have a lien upon the judgments recovered by them for their clients for the amount of their costs, as the legal measure of the value of their services. To that extent the attorney is held to be the equitable assignee of the judgment. Lord Kenyon said, in the case of *Read* vs. *Draper*, 6 Term R. 361, that it had "been settled long ago that a party should not run away with the fruits of the cause without satisfying the legal demands of his attorney by whose industry and expense those fruits were obtained." Previous to the enactment of the Code of Procedure the rule was the same in this State, but, by the benign provisions of the Code, the limitation by which the lien was confined to the taxable costs is removed. An attorney may now agree with his client for the amount of his compensation; and, when a special agreement exists, the lien extends to the stipulated compensation.—(*Rooney* vs. *Second Avenue R. R. Co.*, 18 N. Y., 368.)

[2] *Kennedy* vs. *Brown and wife*, 13 Com. Bench Reports, N. S., 677.

suit, by which she secured the possession of an estate valued at about £60,000. He had given up his local practice, moved to London, and devoted himself for years to his client's interests with a zeal and success which secured to her all she claimed. During the progress of the litigation she had promised to pay him a fee of £20,000 in case of success. The lady succeeded, and then, exercising the prerogative of her sex, changed her mind, and the lawyer found himself in the unlucky predicament of having gained his cause at the cost of his client and his fee. Not being in a condition to sue for her hand, he sued for his fee, and, being met with the plea that he could not maintain the action, he turned all his energies to the establishment of the proposition that by the law of England he was entitled to recover. He claimed, in a most learned, ingenious, and bold argument, that Blackstone was mistaken in saying, as he did in his Commentaries, that the compensation of a counsel was purely honorary "and such as the counsellor may not demand with-

out doing injury to his reputation," and that the notion that the barrister could not contract for pay was a rule of the civil law never engrafted upon the jurisprudence of Great Britain. But his claim was too large, and the circumstances attending his relations to his client were unfavorable to his success, and, after getting the verdict of a jury in his favor, it was set aside by the Court.

Chief-Justice Erle, in an opinion which reminds one of Chief-Justice Bronson's way with obnoxious counsel, deals some heavy blows against the claimant; he puts his decision upon authority, from Sir John Davies, in the beginning of the Seventeenth century, down to the present day, and then proceeds to rest it upon principle also, and claims that it is essential to the dignity and integrity of the profession that they should be utterly incapacitated from contracting for any reward for their services, and that their words and acts should be guided by a sense of duty and a lofty disregard of gain. The gush of enthusiasm, which such high-toned views

might otherwise evoke, is somewhat tempered by the knowledge of the fact that the English barrister, in practice, in all ordinary cases, takes care to get his fee in advance, and by the admitted fact that it is disreputable for a client to omit its payment. It is hardly necessary to say that the law laid down by Chief-Justice Erle is not the law with us. We are entirely too practical a people to comprehend—at all events to act upon—so refined a distinction as this, that while the fee paid as a gratuity, and in the pocket of the counsel, is a source of moral elevation and dignity, the same fee agreed to be paid is a source of moral degradation. According to this view, it is disgraceful for a counsel to bargain for a fee, but it is disreputable for a client not to pay it; the result being, that the lawyer gets his money. Perhaps this may fairly be cited as a specimen of British professional "neutrality."

But, while I believe that our courts are right in holding that the services of counsel

may be a matter of contract equally with all other kinds of service, and that the legal laborer is worthy of his hire, it should not be forgotten for a moment that the true motive and spur of effort on the part of the lawyer is something far beyond the pecuniary result of his efforts. No one supposes that the physician is calculating his fee when he counts the pulse of his patient, or that the clergyman weighs the souls of his parishioners in the balance with his salary. It is not for the fee of his client, not even for the professional repute which follows success, and which is dearer than money, that a lawyer, truly devoted to his profession, gives his days and nights to his client's cause. It is to satisfy his own sense of duty, and for this he will go far beyond the service which would be doled out for a stipulated price. I believe that, taken as a whole, no class of men were ever found less greedy of gain, or more faithful in the labor they perform, than the Bar of this State. We have no need of importing the fanciful notions of the civil law into our ju-

risprudence to make our lawyers zealous and sincere.

One of the unsolved problems of biography is the question whence Cicero derived the means with which to support not only his princely residence at Rome, but the eight or ten villas in the Alban Hills and along the shores of the Mediterranean, in which he solaced himself, in his long vacations, with his books and his philosophy. His latest biographer, in a work full of interest to our profession, accounts for his revenue as derived, in great part, from legacies of his clients, which must have been upon a scale far exceeding any modern displays of posthumous gratitude. Possibly it was so, but it would be a most uncomfortable sensation for a modern practitioner to feel that his chief source of pecuniary support depended upon the decease of his clients, that practically his only ledger account was in the obituary columns of the newspapers, and that a corporation began to pay only after its dissolution!

Let us, then, rest satisfied with standing in

respect to our rewards upon the same plane with all other workmen who, under the benignant law of labor, turn the primal curse into a blessing, and do with our might what our hands find to do in the profession of our choice. It is a hard and exacting service, but so is every form of intellectual effort. If our clients have the best that we can give, it is right that it should be so, not because a bargain is a bargain, but because the faithful performance of duty is the noblest exercise of the human faculties. There is this intrinsic dignity in our profession, that its labors are not for ourselves, but for others, and that in the discharge of its duties we serve, in our humble and imperfect way, that Eternal Justice which is earlier than time and older than all creeds, and whose decrees will be executed when all human systems shall have spent their force.

THE END.

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